that, with a copy of the new statutes at hand, the practicing lawyer will find that the book is a great labor saving device for relieving him of the necessity for research back of October, 1921. One wonders if it would not be an economy if the writers of text books would supply insert pages, bringing their books to date, as McKinney does with his New York statutes. The part of the book dealing with possessory rights and remedies under the emergency laws is especially helpful, and that part of it summarizing the cases (Chapter XVI) on Reasonable Rent, as well as the chapter on the effect of the presumption (Chapter XV), is very valuable. The title of the book—*The Tenant and His Landlord*—would seem to indicate that the authors' predilection is to put the tenant first, but there is nothing in the book to disclose such a prejudice, and landlords appearing in Judge Lauer's court need not fear. The authors have carefully concealed, perhaps because of the desire to preserve judicial impartiality, their own feelings concerning the emergency housing laws. As they have indicated in their foreword, the book is to meet the demand "for an authoritative compilation of the recent emergency 'housing' or 'rent' laws of the State of New York, and related statutes, and of the several hundred interpretative decisions rendered by various courts." The reviewer, therefore, must restrain his impulse to criticise the rather inadequate treatment of the "General History and Survey of the Housing Problem," in which but four brief pages are devoted to "The Relation of Landlord and Tenant . . . Early History." Perhaps in another edition, working under less pressure to get out the book, they will give their readers a fuller historical background for the statutes. As indicated in the earlier portions of this review, the reviewer believes that this background is very much needed by American lawyers.

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MANUAL OF THE LAW OF EVIDENCE. By SIDNEY L. PHIPSON. Third Edition. London: SWEET & MAXWELL, LIMITED. 1921. pp. xxxii, 239.

This manual, which is an abridgment of the sixth edition of the author's well-known larger treatise on the same subject, is a brief compendium of the law of evidence intended for the use of students. The book deals with the law of England alone, a fact which has enabled the author to state the law with much greater brevity and certainty than would have been the case had the American law also been included. In some respects, the author follows the plan laid down in Stephen's *Digest of Evidence*, in that he states the rules first and then gives after each rule a series of examples taken from illustrative English decisions. Mr. Phipson's book, however, is a great improvement on Stephen's work in two respects; first, because he does not, like Stephen, state the bald rules alone in digest form, but also briefly states the reasons that underlie them; and, secondly, because he has adopted a more modern treatment of certain topics, such as the burden of proof.

The book on every page gives evidence of careful research and painstaking labor, but it cannot escape from certain limitations that are inherent in the method of treatment which the author has adopted. Viewed as a book for students, this manual labors under all the difficulties that arise in attempting to master a branch of the law by studying a condensed, second-hand view of original decisions. Too often, extreme brevity gives the bones of a case without its flesh. For example, when one learns from an abstract of *Stobart* v. *Dryden*[1] that "the question being whether a certain deed was forged;—a statement made by the attesting witness (de-

[1] (1836) 1 M. & W. 614.

ceased) that it was forged, is inadmissible," (p. 61), one may know what the case decided, but one knows nothing of the *pros* and *cons* which were discussed by Baron Parke before reaching this result, a discussion which makes the above decision one of the most striking bits of judicial reasoning in the law of evidence. Of course, the fact that bareness thus accompanies brevity is no fault of the author of this manual, but it is a defect which necessarily results from his scheme. Then, too, the learning of rules of evidence from a brief manual like the present one may give the reader a handy knowledge of rules, but that knowledge will inevitably be shallow. If, however, the student supplements his study of the rules by reading the original decisions in the cases cited as examples in the book, or, better still, if he reads the cases first, and the manual afterward, he will get a real understanding of the law of evidence, will be able to grasp the meaning of the manual itself more clearly, and, what is of still greater importance, will be able to form an opinion of his own as to whether the author's statements are sound or questionable.

Brevity of treatment, it is true, saves time, but it often leads the student into the vicious habit of accepting uncritically the statements of the author as if they were absolute dogma. For example, let us take the following:

"Numerous facts (*e. g.*, that a witness was not sworn in a particular way, or that, at the date of the trial, a hearsay declarant was dead, a document was thirty years old, or, if lost, was duly searched for) are legally admissible though they may have no logical bearing on the issue. It is not correct, therefore, to say, as is sometimes done (*e. g.*, Thayer, Pr. Tr. Ev. 266; Wigmore, Ev. s, 9; Wills, Ev., 2nd ed. 58), that 'without any exception, nothing that is not logically relevant is admissible.' Indeed, Sir J. Stephen amended his original definition of relevancy to mark this very distinction by the use of the terms 'relevant,' and 'deemed to be relevant,' respectively (art. 2; *cp.* Best s. 34)," (p. 15).

The foregoing statement is one which the student is expected to accept and learn, and yet it seems unsound. These "numerous facts," of which examples are given by the author as admissible, though (as he states) they "have no logical bearing on the issue," may be used for either of two purposes: (1) To satisfy the *court* that certain evidence (*e. g.*, a hearsay declaration, or copy of a written instrument) is admissible; on the question of its admissibility, the only "issue" is, has the rule of evidence governing its admissibility been satisfied, and on this issue such facts as that the declarant is dead, or a search for the original instrument has been made, are logically relevant. (2) To convince the jury that certain logically relevant evidence (*e. g.*, the foregoing declaration or copy) which has already been admitted in evidence to the jury is credible. If, then, the declaration or copy which has already been admitted is logically relevant to the issue, it would seem to follow that any admissible evidence bearing on the credibility of the evidence thus previously admitted is also logically relevant. Surely, the question whether certain evidence, which, if credible, is logically probative of a fact in issue, is true, is a question logically relevant to that issue.

In this connection it should be pointed out that by the term "deemed to be relevant," as used by Stephen, he does not mean, as stated by Mr. Phipson, that anything logically irrelevant is ever admissible, but that some facts usually inadmissible are in some instances "deemed to be relevant" in the sense of being deemed admissible: *e. g.*, character, in criminal cases;[2] hearsay declarations in the ordinary course of duty;[3] or declarations of deceased persons against interest.[4] These are all cases where the evidence offered is classified by Stephen as deemed to be relevant;" and yet they are all cases where the evidence is logically

[2] Stephen, *Digest of the Law of Evidence* (2d Amer. Ed. 1904) Art. 2.
[3] *Ibid.*, Art. 27. [4] *Ibid.*, Ar. 28.

probative of some fact in issue. It seems, therefore, that the position of Thayer and Wigmore on this point, which is stated by Mr. Phipson to be erroneous, is correct.

This example illustrates the danger of learning law from a text-book; it is the danger of absorbing the good and bad alike. If the student learns as law a passage like the one just criticized, he is worse off than without a textbook; whereas if the point in question had been first dealt with by the study of cases, and then discussed by the author with a body of students, it is very likely that the author would have changed his own opinion, and would not have made the above statement at all.

Another example of incorrect analysis seems to be the one that classifies declarations as to bodily or mental feelings (p. 18), or declarations of intention (pp. 100, 101), as "original" evidence, and not as exceptions to the hearsay rule. If such declarations are used to prove the existence of the bodily or mental feeling, or to prove the mental fact of the intention as declared, then they seem to be clearly exceptions to the hearsay rule. Nothing is gained by dodging the issue, as is sometimes attempted, by calling them "conduct." For example, Lord Moulton said in reference to a declaration of paternity by a deceased declarant:

"It was urged at the Bar that although the acts of the deceased might be put in evidence, his words could not. I fail to understand the distinction. Speaking is as much an act as doing." [5]

That "speaking is as much an act as doing" is true, but when spoken words are offered not to prove the fact of speaking, but the truth of what is spoken, they fall within the class of acts excluded as hearsay. The remarks of Thayer in reference to the subject of declarations accompanying the *res gesta* are also in point here:

"The subject . . . is often loosely handled,—as if it were enough to find that declarations were in themselves probative, merely as circumstantial facts, without relying on the declarant's credit, and as if, by calling them 'verbal facts,' they could then be treated just like other facts. But in studying the hearsay rule and observing the shape of the exceptions to it, all becomes confusion if it be not remembered that declarations are often fundamentally different from other facts." [6]

Admissions are treated in this manual as an exception to the hearsay rule. This is contrary to the theory of Greenleaf, which was adopted by Thayer.[7] The merit of Greenleaf's theory, which treats admissions as dispensations from the need of proof rather than proof itself, is that this theory explains why such declarations are not admissible against third parties, and hence are not (like declarations of deceased persons against interest) a genuine exception to the hearsay rule. Mr. Phipson explains the reception of admissions in evidence on the ground "that a party's declarations may always be presumed to be true as against himself," (p. 62). This explanation, however, as Greenleaf points out,[8] is inadequate, inasmuch as the party when he made the assertion may have believed it was to his advantage to make it, and so may have had every motive to speak untruly, and yet, even such an assertion will be good against him, if it operates against him at the time of trial. Therefore, it seems preferable to classify admissions as dispensations from proof, which differ from admissions made by way of pleading only in that the effect of the former may be explained away, while the latter are absolutely final for the purposes of the trial.[9]

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[5] *Lloyd* v. *Powell, etc., Co.* [1914] A. C. 733, 750.
[6] Thayer. *Cases on Evidence* (2d ed. 1900) 671.
[7] *Ibid.*, 111.
[8] 1 Greenleaf, *Evidence* (16th ed. 1899) § 169.
[9] See (1920) 20 COLUMBIA LAW REV. 809.

Justice to the author requires the fullest acknowledgment of the painstaking care with which the work has been done. At the bottom of page 64, in the right hand column, the sentence "A had replied," should evidently read "B had replied"; but the printing and proof-reading are in general excellent. Moreover, the book abounds in clear, accurate and concise statements of law. Take, for example, the following admirable statement of the rule governing the admission of declarations which are part of the *res gesta*:

"The declarations must be substantially *contemporaneous* with the act, *i. e.*, made either during, or immediately before or after, its occurrence—but not at such an interval as to allow of fabrication, or to reduce them to the mere narrative of a past event," (p. 17).

It will be noted that this statement would exclude what one called "spontaneous exclamations," when made at a considerable interval after an event though still under its influence, although such exclamations are admissible according to some American authorities.[10] In regard to such declarations, the author calls our attention to the fact that even the extreme case of *Reg.* v. *Bedingfield*[11] has since been approved in England.[12] Without going so far as *Bedingfield's Case,* it may be said that the general tendency of the English courts in requiring the practical contemporaneousness of the declaration and the act it accompanies seems sound.[13]

Taken as a whole, the book is far superior in its method of treatment to that employed by Stephen in his *Digest;* indeed, Stephen's book is about the worst book possible for a student to use, if he wishes to acquire training as opposed to mere information. Mr. Phipson is to be congratulated on having made his book far more than a series of rules unaccompanied by the reasons on which they rest. Indeed, it may fairly be said that the book is the best short treatise of evidence that has appeared in England.

While the author has stated in his title that the book is "for the use of students," the book ought also to be of use to the practitioner for quick reference in the course of trials. For the student, too, the book will be of great value, if it spurs him to go beyond the book into the authorities, and if he uses it not merely as material to be memorized, but as a statement of principles which he must learn to verify and to criticize by further study of the sources of the law.

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WILLISTON ON CONTRACTS. By CLARENCE M. LEWIS. New York: BAKER VOORHIS & COMPANY. 1922. Vol. V, pp. xi, 725.

The practice of preparing and publishing books of forms to accompany text books on various legal subjects has been a more or less constant factor in law book making for many years, but has seemed to grow in popularity in recent years. It has been deemed useful for the practitioner to have at hand in connection with text books containing the substantive law on a given legal topic, the forms, claimed to have been authenticated by the courts in connection with their decisions, by the use of which practitioners may invoke and secure the protection of the rules of law purported to be set forth in the text books. Such books of forms should and do serve a useful purpose; not perhaps the purpose for which some practitioners erroneously believe they have been designed; namely, to save them the time.

[10] *E. g., People* v. *Del Vermo* (1908) 192 N. Y. 470, 85 N. E. 690.
[11] (1879) 14 Cox C. C. 341.
[12] *Rex* v. *Christie* [1914] A. C. 545.
[13] See *supra,* footnote 9.